IN THE MATTER OF THE ONTARIO HUMAN RIGHTS CODE,
S.O. 1981, c. 53, as amended

and IN THE MATTER OF the complaint made by Mr. Eckart (Jim) Herciuk, dated January 14, 1983, alleging discrimination in employment on the basis of handicap by Weston Bakeries Ltd., its Servants and Mr. Donald Banks.

INTERIM DECISION
MAY 8, 1989

Board of Inquiry: Berend Hovius

Appearances: For the Ontario Human Rights Commission:
Ms. A. Molloy
Ms. D. Rice

For the respondents:
Mr. M. Addario

Hearings: March 31 and April 21, 1989.

Introduction:

On March 3, 1989 I was appointed to act as a Board of Inquiry to hear and decide the complaint of Mr. Eckart (Jim) Herciuk against Weston Bakeries Ltd. and Mr. Donald Banks alleging discrimination in employment on the basis of handicap. On March 31, the hearings was commended by conference call. The parties all agreed to this method of commencing the hearing since the purpose of the initial hearing was simply to set future dates. April 21st was set as the first date on which we would meet to deal with certain preliminary objections by the respondents. At that time the respondents asked the Board to dismiss the complaint without a hearing on the merits on the basis of undue delay. Mr. Addario, for the respondents, acknowledged that the complaint was filed in a timely fashion, but he insisted that it would be an abuse of process for the Board to hear the merits in light of the delay of more than six years between the filing of the complaint and the appointment of the board. He indicated that the respondents had objected to the delays in the processing of the complaint by the Commission on a number of occasions.

In order to establish the factual basis on which the Board, in Mr. Addario's view, should exercise its authority to prevent abuse of its processes pursuant to s. 23(1) of the Statutory Powers Procedure Act, R.S.O. 1980, c. 484, Mr. Addario called Mr. Donald Banks as a witness. Mr. Banks indicated that as Human Resources Manager of Weston Bakeries he received a copy of Mr. Herciuk's complaint together with a covering letter from the Commission

asking him to complete a respondent questionnaire. He indicated that he completed this questionnaire and returned it.

At this point in Mr. Bank's testimony, Ms. Molloy, counsel for the Ontario Human Rights Commission, objected to this line of questioning. She insisted that a review of the Commission's handling of the complaint was beyond the jurisdiction of the Board. In particular, she argued that any evidence relating to the reasons for the delay between the filing of the complaint and the appointment of the Board was simply irrelevant and should not be heard because it might prejudice the Commission and the complainant. She acknowledged that the Board had, pursuant to s. 23(1) of the Statutory Powers Procedure Act, jurisdiction to dismiss a complaint before the hearing of the merits if the delay had so prejudiced the respondents that it would constitute an abuse of process to continue or if the delay had made it impossible for the Board to carry out its function because it was no longer possible to ascertain the merits of the complaint. However, she maintained that the only facts which were relevant to the exercise of this jurisdiction were (i) the existence and extent of the delay and (ii) the effects of this delay on the ability of the respondents to present their case and the ability of the Board to determine the facts. She also pointed out that no Board of Inquiry had ever dismissed a complaint under the Human Rights Code on this basis despite numerous motions at the outset of the hearing.

In response, Mr. Addario asserted that the Board should hear evidence with respect to the various periods of time for which the complaint sat idle, the reason given by the Commission to the respondents for the delay, and the attempts made by the respondents over the course of the years to get the Commission to deal with it. Only in this way would the Board be in a position to appreciate the respondents' submissions with respect to delay and to exercise its power under s. 23(1) of the Statutory Powers Procedure Act. He gave an assurance that the evidence would not relate to the details of efforts to settle or other privileged matters. Nor would it relate to the merits of the complaint. While he acknowledged that the case law indicated that a Board of Inquiry under the Human Rights Code would rarely dismiss a complaint on the basis of undue delay, he insisted that this did not preclude him from calling evidence to establish a proper case for the exercise of this power and to ensure that the Board had knowledge of all relevant factors. He pointed out that in a number of cases under the Ontario Human Rights Code, the Boards of Inquiry had investigated the reasons for the delay in the processing of the complaint and the behaviour of the respondents in the face of the delay.

The only question at this stage is whether the respondents should be prevented from adducing the evidence referred to above on the basis that such evidence is totally irrelevant to their request that the Board dismiss the complaint without hearing the merits.

The parties referred to a number of cases dealing with the issue of delay in the context of human rights proceedings. An early leading case is Hyman v. Southam Murray Printing Ltd. (1981), 3 C.H.R.R.D./617 in which Professor McCamus stated that the mere passage of time, by itself, would not justify dismissal of the complaint at the outset of the hearing. A key passage in the reasons is contained in paragraph 5619:

> My own view is that while unreasonable delay might be a factor to be taken into account in refusing or fashioning a remedy, ... or in weighing the persuasive force or credibility of testimony or other evidence, delay in instituting or processing a complaint should not be considered a basis for dismissing the complaint at the outset of the proceedings before a board of inquiry unless it has given rise to a situation in which the board of inquiry is of the view that the facts relating to the incident in question cannot be established with sufficient certainty to constitute the basis of a determination that a contravention of the Code has occurred. Having been assigned, by order of the Minister of Labour, a statutorily defined task of undertaking an inquiry to ascertain certain facts, the board of inquiry should proceed to attempt to do so, notwithstanding the passage of considerable time, unless the passage of time has made fulfilment of its task impossible. In the absence of such, admittedly unlikely circumstances, the proper course is for the board of inquiry to proceed and to weigh the prejudice or unfairness to a particular party which may have been occasioned by the delay in making particular findings of fact or in refusing or fashioning a remedy. It may be that a particular respondent may view the appointment of a board of inquiry by the minister, or, indeed, the recommendation of the Commission that a board of inquiry be appointed, to constitute an abuse of a discretionary power conferred by statute. That, however, is a matter to be tested in another forum.

The Hyman case has sometimes been accepted as authority for the principle that delay will provide a basis for dismissing the complaint only if delay has made it impossible for the inquiry into

the complaint to proceed (Tabar v. West End Construction Ltd. (1982), 3 C.H.R.R. D/1073 and Shepherd v. Bama Artisans Inc. (1988), 9 C.H.R.R. D/786). If this is accepted as a correct statement of the law, then the sole issue in any case where a Board of Inquiry is asked to dismiss a complaint on the basis of delay would be whether it is still possible to ascertain the facts. The reasons for the delay would not be relevant to this determination.

However, other cases suggest that a Board of Inquiry's jurisdiction to dismiss a complaint at the outset of the hearing can also be exercised where delay causes the respondents undue prejudice in the presentation of a defence or where to proceed would constitute an abuse of process. In Gohm v. Domtar Inc. (unreported preliminary decision, June 14, 1989), Professor Pentney quoted paragraph 5619 from the reasons in Hyman and concluded (at p. 6):

> The essential point in the passage quoted above, in my view, is that although a Board of Inquiry has jurisdiction to dismiss a complaint for delay, that jurisdiction should be sparingly exercised. This accords with my understanding of s. 23(1) of the Statutory Powers Procedure Act, which I find empowers a Board of Inquiry to dismiss a complaint in appropriate circumstances, where to proceed would be 'impossible' or an 'abuse of process'. These circumstances will undoubtedly be rare, but that alone does not affect the basic question of jurisdiction to dismiss.

Although he declined to dismiss the complaint at the outset, Professor Pentney added (at p. 10):

> I do not want to leave this discussion without emphasizing that this decision does not foreclose the possibility that at some point during the hearing it may appear that the complaints should be dismissed because

> the respondents are suffering undue prejudice in the presentation of their defence, or it is otherwise impossible to proceed.

In Quereski v. Central High School of Commerce (1988), 9 C.H.R.R. D/710, Professor Ratushny made the following comments about s. 23(1) of the Statutory Powers Procedure Act (at paragraph 35253):

> This subsection appears to provide jurisdiction to dismiss a complaint for reason of delay. However, the delay would have to approach the standard of an abuse of the processes of the tribunal. No such delay could be said to exist in the case before us. Nor is there any specific or substantial prejudice related to the delay which did occur.

See also McMinn v. Sault Ste. Marie Professional Firefighters (1986), 7 C.H.R.R. D/3458.

It was presumably in light of these decisions that Ms. Molloy conceded that this Board has jurisdiction to dismiss the complaint at the outset of the hearing where the delay has so prejudiced the respondents that to continue would constitute an abuse of process. Once this is accepted, it follows that the respondents' behaviour is relevant. If, for example, the respondents were responsible for the delay they might be precluded from alleging that the complaint should be dismissed because the delay had substantially prejudiced their ability to present a defence. It also follows that the reason given by the Commission for the delay may be relevant in assessing any prejudice to the respondents. For example, the reason given may have led the respondents to presume on reasonable

grounds that the matter had been abandoned and thereby caused them to believe that it was not necessary to take steps to gather or preserve the relevant evidence. See Gohm, supra.

The Boards of Inquiry in Hyman, McMinn, Gohm, and Quereshi were all aware of the chronology of events leading up to their appointment. The reasons for the delay and the parties' conduct in relation to the delay were expressly explored in several of these cases. As Ms. Molloy pointed out, it may be that no objection was made regarding the receipt of this evidence. Indeed, in McMinn the parties appear to have expedited the proceeding by agreeing to a statement of facts for the purposes of several preliminary motions. Nevertheless, the Boards would not have received or considered this evidence if they did not believe it to be relevant.

I, therefore, conclude that evidence regarding the various periods of time during which this complaint sat idle, the reason given by the Commission to the respondents for the delay, and the attempts made by the respondents over the years to get the Commission to deal with it are relevant to this preliminary motion. Mr. Banks is entitled to testify regarding these matters. Of course, any evidence which is covered by the doctrine of privilege is inadmissible. (See s. 15(2) of the Statutory Powers Procedure Act).

The case law indicates that a Board of Inquiry will exercise its jurisdiction to dismiss a complaint at the outset of the hearing on the basis of undue delay very sparingly. Indeed, it would appear that this power has never been exercised. However, this does not preclude the respondent from attempting to establish that there are extraordinary circumstances justifying dismissal in this case and presenting all relevant evidence. Obviously, it would expedite matters if the parties could present an agreed statement of facts relating to this preliminary motion.